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A BRIEF SURVEY OF EQUITY JURISDICTION.[1]

VII. — CREDITORS' BILLS.

IN the preceding article the writer was compelled to confine himself strictly to the question, why Equity has jurisdiction over creditors' bills; and, therefore, nothing was said as to the consequences which have followed from the establishment of that jurisdiction. And yet those consequences are much more important, if not more interesting, than the mere fact of the existence of the jurisdiction or the reasons upon which it was founded. To those consequences, therefore, the reader's attention will be directed in the present article.

Prior to the establishment of the jurisdiction over creditors' bills equity had nothing to do with the administration of the estates of deceased persons. Now, the personal estates of all deceased persons are, in England, administered in equity; and the first stage in this great legal revolution was the establishment of the jurisdiction of equity over creditors' bills.

The administration of the personal estate of a deceased person consists first in collecting the debts due to the estate, and in converting the specific property, not specifically bequeathed, into money; secondly, in paying the debts due from the estate, in delivering the specific legacies, in paying the pecuniary legacies, and in paying the residue to the residuary legatee or next of kin, as the case may be. The doing of these various acts constitutes the duty of the executor.[2] If he does them voluntarily, and to

[1] Continued from Vol. IV. p. 127.

[2] As there are no material differences, for the purposes of this article, between an executor and an administrator, it will generally be assumed that the deceased person is a testator, and that his personal representative is an executor.

the satisfaction of all the persons interested in having them done, there will be no occasion for resorting to any court, and the estate will be administered out of court. If the executor fail to do his duty, or if a claim be made against the estate which the executor refuses to admit, or if the persons interested in the estate cannot agree as to their respective rights, a court must be applied to. Of course, the court must be one which has jurisdiction over the subject of the application, and the application must be made by a person who has the legal interest in the subject, *i.e.*, by a creditor, a legatee, or a next of kin of the deceased.[1] If the application is to be made by a creditor, originally a court of common law could alone be applied to; if by a legatee or next of kin, originally the proper ecclesiastical court could alone be applied to. As soon as equity assumed jurisdiction over creditors' bills, a creditor could, of course, apply to a court of common law or to a court of equity, at his option. But so long as the ecclesiastical courts could alone be resorted to by legatees and next of kin, equity could not fully administer the estate of any deceased person, unless it turned out to be insolvent, and so was wholly exhausted by creditors.

The next step taken by equity was to assume jurisdiction over bills by legatees and next of kin, and this it did soon after its jurisdiction over creditors' bills was established. Of the reasons why this was done, little need be said in this place.[2] Suffice it to observe that, in thus extending its jurisdiction, equity relied much upon the strong arm of the Court of Chancery (coupled with the weakness and unpopularity of the ecclesiastical courts) and little upon argument. Thus, on the 11th day of May, 1682, a plea to a bill by next of kin, that the jurisdiction was in the Ordinary, was overruled by Lord Chancellor Nottingham, no reason being reported;[3] and on the 6th of February following, in two cases, a demurrer to a similar bill met the same fate at the hands of Lord Keeper North, no other reason being given than "that

[1] Sometimes, as will be seen hereafter, the executor himself may file a bill in equity; but the bill is, in that case, in the nature of a bill of interpleader. See *infra*, pp. 126–7.

[2] Of course this is not the proper place to inquire into the jurisdiction of equity over bills by legatees and next of kin. Such bills are, however, so intimately connected with creditors' bills that it has been found impracticable to avoid speaking of them incidentally in the present article. Moreover, every administration bill, by whomsoever filed, necessarily results in the application of the estate, so far as is necessary, to the payment of the debts of the deceased.

[3] Pamplin *v.* Green, 2 Ch. Cas. 95.

the spiritual court in that case had but a lame jurisdiction."[1] As to the precise time when equity first assumed jurisdiction over bills by legatees, there seems to be an absence of evidence; but there is little room for doubt that it was at an earlier date than that just named. There was, indeed, a serious objection to the jurisdiction of equity over bills by next of kin, which had no existence in the case of bills by legatees; for it was argued (and not without force) that the Statute of Distributions,[2] on which the rights of next of kin are founded, vested exclusively in the Ordinary the jurisdiction of compelling payment of distributive shares.

The Court of Chancery was never content to share with the ecclesiastical courts any jurisdiction exercised by it, and, therefore, as often as it usurped the jurisdiction of the latter courts, it soon found the means of making its own jurisdiction exclusive; and so it was in the case now under consideration. The Court of Chancery ever lent a willing ear to the complaints of executors who were sued by legatees or next of kin in the ecclesiastical courts; and it did not hesitate to grant injunctions whenever it was dissatisfied with the mode in which justice was administered by the latter courts;[3] and even when a final sentence had been given in an ecclesiastical court, the Court of Chancery exercised the right of examining it; and, if it disapproved of it, it treated it as a nullity.[4] The jurisdiction of the ecclesiastical courts over legacies and distributive shares was, therefore, for all practical purposes, speedily destroyed, and for the last two hundred years equity has practically exercised an exclusive jurisdiction over those subjects, the jurisdiction of the ecclesiastical courts over the estates of persons deceased having, for the same length of time, been practically limited to taking the probate of wills, granting letters testamentary and of administration, and requiring the filing of inventories by executors and administrators.

Equity, having thus acquired concurrent jurisdiction (*i.e.*, con-

[1] Matthews *v.* Newby, 1 Vern. 133; Howard *v.* Howard, *id.* 134.

[2] 22 & 23 Car. II., c. 10 (1670). That the statute assumed that the ecclesiastical courts alone would have jurisdiction to enforce the rights created by it, was never doubted; and the only answer that was ever given to the argument founded on the statute was that the latter contained no negative words, *i.e.*, did not in terms exclude the jurisdiction of equity. See Matthews *v.* Newby, *supra*.

[3] Vanbrough *v.* Cock, 1 Ch. Cas. 200; Horrell *v.* Waldron, 1 Vern. 26; Nicholas *v.* Nicholas, Ch. Prec. 546; Anon., 1 Atk. 491. But see Basset *v.* Basset, 3 Atk. 203.

[4] Bissell *v.* Axtell, 2 Vern. 47.

current with courts of common law) over the claims of creditors of deceased persons, and exclusive jurisdiction over the claims of legatees and next of kin, had jurisdiction to administer fully and completely the personal estate of any deceased person, when properly applied to for that purpose, — a jurisdiction which no one court had ever before possessed; and the best justification of the Court of Chancery in extending its jurisdiction to bills by legatees and next of kin will be found in the need there was that some one court should have jurisdiction to administer the estates of deceased persons in respect as well to the claims of creditors as to the claims of legatees and next of kin.

The acquisition of the necessary jurisdiction was, however, only the beginning of the task which equity had before it. The difficulty which it next encountered lay in the fact that it had no suitable machinery for administering the estates of deceased persons. The only (or rather the best) machinery that it had for the purpose was that furnished by an ordinary suit; but that was neither adequate nor suitable. The only thing at all analogous which equity had been called upon to do was to administer the estate of a bankrupt debtor; but that was done, not by a suit, but by a proceeding specially provided for the purpose by statute. If it be asked why it was not sufficient for any creditor, legatee, or next of kin, whose claim was not satisfied, to bring a suit against the executor to enforce such claim, it may be answered, first, that it did not lie in the mouth of equity, in view of its recent extension of its jurisdiction, to say that nothing further was necessary, as a creditor, legatee, or next of kin could always sue the executor, the former at common law, the two latter in the ecclesiastical courts; secondly, that no one suit by a creditor, legatee, or next of kin, against the executor, to enforce his individual claim, would enable equity to administer the estate, nor would any number of separate suits of that kind. On the contrary, such a mode of proceeding would have assumed that every estate of a deceased person was to be administered out of court, a court being applied to only when some individual claimant had some complaint to make against the executor. Thirdly, if an estate is to be administered by a court, it must be administered by some one suit or proceeding. The administration of an estate consists in dividing it among the several persons who have interests in it or claims upon it, according to their

respective rights; and, to enable a court so to divide an estate, it must ascertain, not only who such persons are, but what are their respective rights; and, in order to enable it to do the latter, it must have all such persons before it (or at least it must give them all an opportunity to come before it) together; and this latter object can be accomplished only by means of one suit or proceeding. In short, when a court undertakes to administer an estate, it must consider the claim of every particular person in connection with the claims of all other persons, and it cannot dispose of any one person's claim separately and by itself. Fourthly, equity was called upon to provide some means of administering the estates of deceased persons, as well to satisfy the demands of justice as to justify itself in assuming complete jurisdiction over such estates. That equity was called upon to do this in order to satisfy the demands of justice, in the case of all estates which were, or might prove to be, insolvent is plain; but in truth the need was not confined to such estates. An estate might, indeed, be so clearly solvent that the executor would be perfectly willing to pay all debts and all specific and pecuniary legacies; but an executor could scarcely ever be perfectly safe in paying over the residue without the authority of some court which had the power and the will to protect him, because he could never be sure that debts would not afterwards appear for which he would be liable.[1] Moreover, in cases where the residue is undisposed of by will, it is frequently uncertain who are the next of kin; and wherever that is the case, it must be ascertained and decided by adequate judicial authority who the next of kin are, before the executor or administrator can safely pay over the residue to any one.

The question then recurs, How could equity so mould the proceedings in an ordinary suit as to make the latter serve the purpose of administering the estate of a deceased person? Equity has done this, and has done it with at least a fair degree of success. In order to understand clearly how it has done it, it will be well to proceed by stages. Let us then first take the simplest case, namely, that of a bill by a residuary legatee against the executor for an account and payment of the residue. Such a bill requires the court to ascertain, first, the amount of the testator's

[1] Norman *v.* Baldry, 6 Sim. 621; 2 Williams, Executors (8th ed.), 1354. But see 22 & 23 Vict., c. 35, s. 29.

personal estate, secondly, the amount of his debts, and, thirdly, the amount given by his will in specific and pecuniary legacies, because it is only in this way that the residue to which the plaintiff is entitled can be ascertained. Accordingly, the first decree will direct a reference to a Master to take an account of the testator's personal estate, debts, and legacies. The first and last of these three items will involve no special difficulty; nor will the Master have any difficulty in taking an account of the debts, so far as they have come to the executor's knowledge; but that is not sufficient. There may be debts which have not come to the executor's knowledge; and, if there are, they must be provided for. Accordingly, the decree will direct the Master to publish advertisements for all creditors of the testator to come in before him and prove their debts, and to state in such advertisements the time within which they must so come in; and the decree will then declare that all creditors who fail to come in within the time so to be stated shall be deprived of any benefit from the decree.

The decree having been made, the reference before the Master will next be proceeded with. As creditors bring in their claims, it will be the duty of the executor to see that they are fully proved, and to resist them if he thinks them not well founded. When, however, the suit is by the person entitled to the residue, he will have the chief interest in resisting unfounded claims, and, therefore, the executor may leave to him the responsibility of deciding what claims shall be resisted, and what resistance shall be made to them. If there is any room for doubt as to the solvency of the estate, every creditor will also be more or less interested in reducing the amount of the debts as much as possible; and accordingly every creditor will be entitled to resist the claim of every other creditor.[1] If a claim be rejected, an opportunity will be given to the claimant, if he desire it, to bring an action or file a bill against the executor to establish his claim.[2] So if a claim be contested in apparent good faith and on reasonable grounds, though unsuccessfully, the claimant will generally be required to bring an action to establish it, if the contestant insists upon a trial at law.[3]

[1] While the executor may, in the Master's office, resist any claim which he thinks unfounded, he cannot prevent a claim's being resisted by others, because he thinks it just, the decree having deprived him of the power of waiving any legal defence. He cannot, therefore, waive the defence of the Statute of Limitations. Shewen *v.* Vanderhorst, 1 R. & M. 347.

[2] See Lockhart *v.* Hardy, 5 Beav. 305.

[3] See Fladong *v.* Winter, 19 Ves. 196.

When all the directions contained in the decree have been fully carried out, the Master will make his report to the court, and when this report has been confirmed, the executor will be required to pay into court whatever money belonging to the estate the report shows to be in his hands, *i.e.*, whatever money the executor is shown to have received, and is not shown to have paid out for some legitimate purpose, or to have lost without his fault. The court requires this of the executor upon the ground that he confessedly holds the money *en autre droit*, and that the plaintiff will be entitled to what remains of it after prior claims have been satisfied. Moreover, if the report shows that any part of the assets consists of debts due to the estate, and which have not yet been collected, or of specific property which has not yet been converted into money, the executor will be directed to collect such debts, and to convert such specific property into money, as speedily as it may conveniently be done, and to pay into court the money thus realized.[1]

Finally, when the estate has all been converted into money, and the money paid into court, and when all claims upon the estate, except claims for costs, have been adjusted, the cause will be set down for a further hearing, and a final decree will be made, directing the Master to tax the costs of all parties whose costs are to be paid out of the estate, and thereupon directing all claims upon the estate which have been established, including interest and costs, to be paid out of the money in court, and directing the residue of that money to be paid to the plaintiff.

Of course it may happen that some creditor of the testator has failed to come in before the Master and prove his debt. If such should be the case, what will be the rights of such creditor? At law, his rights will remain the same as if no bill in equity had ever been filed, and if the estate was sufficient to pay all creditors in full, he will still have a legal right to compel the executor to pay him; but equity will not permit him to enforce that right; and he can, therefore, avail himself only of such remedy as equity itself will give him, and equity will give him no remedy whatever against the executor.[2] If, however, he apply while the money still remains in court, he will be let in with the other creditors, and no other

[1] This is by virtue of the 45th General Order of Aug. 26, 1841. See Sanders, p. 886.

[2] Farrell *v.* Smith, 2 B. & B. 337.

penalty will be imposed upon him than the payment of such costs as have been occasioned by his coming in so late.[1] But if the money be paid out of court before his claim is presented, all that the court can do for him is to permit him to file a bill against the person or persons upon whom his debt would have fallen, if it had been paid, to compel him or them to pay his debt out of what he or they have received from the estate; and this it will generally permit him to do. But if the debt, in case it had been paid, would have fallen upon several persons, he will be permitted to recover only a *pro rata* share from each, and not the whole from any one.[2]

Here then is one instance in which equity completely administers the estate of a deceased person by means of an ordinary suit, and does so, as is believed, without introducing any anomaly, and without violating any of the principles of procedure. It is true that we have the spectacle of a suit, brought by A against B, being used as a means of satisfying a claim made by C against B, C being no party to the suit. Under ordinary circumstances, this would undoubtedly be inadmissible; but, under the peculiar circumstances of the case now under consideration, it seems to be open to no objection. A cannot object because the payment of C's claim is a necessary condition of his obtaining the relief which he seeks. B cannot object, as he is in no way prejudiced. If C's claim be not well founded, he will have a full opportunity to resist it; and if he cannot successfully resist it in A's suit, he may, as has been seen, provided he can raise a reasonable doubt of its validity, require C to bring an action against him to establish it. B cannot object to being called upon to pay a claim of C in a suit brought for the sole purpose of compelling payment of a claim of A, for he has nothing to do with paying either. He pays the money into court in any event; and he has no concern with what afterwards becomes of it.

Can C complain of being required to come in and prove his claim in A's suit, at the peril of the estate's being administered without regard to his claim? It seems not. He has the fullest facilities for establishing his claim, even to the extent of bringing an action for that purpose, if necessary. It is true that the estate

[1] Lashley *v.* Hogg, 11 Ves. 602; Angell *v.* Haddon, 1 Madd. 529; Brown *v.* Lake, 1 DeG. & Sm. 144.

[2] Gillespie *v.* Alexander, 3 Russ. 130; Greig *v.* Somerville, 1 R. & M. 338. Compare 1 Davies *v.* Nicolson, 2 DeG. & J. 693.

may be administered without his knowledge; but that is no more than might happen if the estate were administered by the executor out of court. The administration of an estate cannot be delayed forever, because all claims against it *may* not have been brought in; and if the executor wait a reasonable length of time, or as long as the law requires him to wait, and use all other reasonable precautions, or all such as the law requires, and then proceeds to distribute the estate, no claim of which he then had no knowledge can afterwards be enforced against him.[1]

Can it be said that it is inconsistent with the true principles of procedure, and, therefore, injurious to the public, to permit a suit, brought by A against B, to be used as a means of compelling payment of a claim of C against B? In the mode and under the circumstances now supposed, it seems not. It is to be observed that C's claim does not affect the suit at all until the latter gets into the Master's office. In the Master's office C's claim can cause no difficulty, as the proceedings there are independent of the other proceedings in the suit. The Master simply carries out the directions contained in the decree, and such directions are all that he need know of the suit. Nor is the reference to the Master caused by C's claim, as it would be necessary in any event. Of course C's claim will cause A some delay in the Master's office, but, for the reason before stated, A cannot complain of that inconvenience. Will C's claim cause any inconvenience in the subsequent proceedings in the cause? The only thing that will remain to be done, after the Master's report has been made and confirmed, will be for the court to make its final decree. Undoubtedly, it is a cardinal rule that the relief given in a suit must be confined to the parties to that suit, and generally it must be confined to the plaintiff or plaintiffs. Moreover, as a rule, when there are more plaintiffs than one in a suit, they must, for all the purposes of the suit, constitute a unit, as a court of equity will not give separate and independent relief to each of several plaintiffs; and yet, in the case now supposed, the court must, by its final decree, give separate and independent relief, as well to the plaintiff as to each of the persons who have established claims before the Master. The

[1] The proposition in the text was stated on the authority of Chelsea Water Works Co. *v.* Cooper, 1 Esp. 275; but it seems that it cannot, as a general proposition, be supported. See 2 Williams, Executors (8th ed.), 1354; *supra*, p. 105. But see 22 & 23 Vict., c. 35, s. 29.

court would, therefore, undoubtedly encounter very serious difficulties in making its final decree, were it not for one circumstance, namely, the payment of the assets into court. That, however, removes every difficulty; for, in consequence of it, the final decree becomes merely the direction of the court to its own officer as to the disposition of the money in court. In short, the case becomes simply one of paying money out of court.

The subject may be looked at in another light. Supposing the suit of A to be prosecuted to the end for A's sole benefit, what would be the consequence? Clearly, the estate would have to be administered to the extent of having it all converted into money, and the money paid into court; but there A's relief would have to stop until it could be ascertained what claims there were upon the assets superior to A's claim. How would this be done? One way would be for A to present a petition to the court, entitled in the cause of A against B, asking that the residue of the estate be ascertained and paid over to him. The court would then make an order of reference to a Master, containing directions precisely like those contained in the first decree, as stated above, except that the Master would not be required to take an account of the estate, that having been already done. The Master having made his report, and his report having been confirmed, the court would make an order for paying the money out of court in precisely the same terms as if it had been done in the final decree, as before stated. Thus, the same result would be arrived at as before, and by means of one suit, but in a mode much less direct and much more dilatory and expensive.

So much for an administration bill filed by a residuary legatee. If the bill be filed by the next of kin,[1] the residue not having been disposed of by will, the suit will differ in only one material point from a suit by a residuary legatee, namely, that the court must be satisfied that the plaintiff is next of kin, and the sole next of kin to the deceased. How shall the court be satisfied of this? The question broadly is, Who are the next of kin of the deceased? It is, therefore, like the question, Who are the creditors of the deceased? In the former case, too, as well as in the latter, the court must find for itself the answer to the question, as there will be no

[1] In order to avoid raising questions which are foreign to the main purposes of this article, it will be assumed that there is but one residuary legatee, and but one next of kin.

one before the court who will be interested in furnishing a true answer, or upon whom the consequences of an erroneous answer will fall. On the contrary, those consequences will fall upon persons not before the court, and who, therefore, will have no opportunity to be heard. Accordingly, the court will ascertain who are the next of kin of the deceased in the same manner that it ascertains who are his creditors, namely, by referring the cause to a Master, with directions to him to publish advertisements for the next of kin of the deceased to come before him within a time to be limited, and make out their kindred, the court declaring that those who do not so come in will be deprived of all benefit from the decree. When shall the reference for this purpose be made? One might suppose, at first sight, that it would be most convenient to embrace in one reference everything that is to be done by the Master. In truth, however, the question, who are the next of kin of the deceased, is, in its nature, a preliminary question, as upon the answer to it will depend all the subsequent proceedings in the cause. It has, therefore, been found convenient to make the inquiry as to the next of kin the subject of a separate and preliminary reference; and accordingly the first decree is confined to that object.[1] If the result of this reference is against the plaintiff, his bill will be dismissed; if in his favor, the suit will proceed in the same manner as a suit by a residuary legatee. Regularly, therefore, there are three decrees in a suit by a next of kin, while there are only two in a suit by a residuary legatee.

If the bill be filed by a pecuniary legatee for the recovery of his legacy, a somewhat different case will be presented. As the claim of a pecuniary legatee is for a definite sum of money, and as he has no interest in the estate beyond the amount of his legacy, he will not be entitled to an account of assets, if the executor will admit them to be sufficient to pay the plaintiff's legacy; but if the executor will not admit the assets to be sufficient for that purpose, he will be required to give an account; and, in that event, the first decree will be the same as upon a bill by a residuary legatee, *i.e.*, the Master will be required to take an account, not only of the personal estate of the testator, but also of his debts, and of his specific and pecuniary legacies. An account of the debts and specific legacies will be required for the same reason as upon a bill by a residuary legatee, namely, that

[1] See Seton on Decrees (1st ed.), p 72.

debts and specific legacies have a priority over pecuniary legacies. An account of the pecuniary legacies will be required because all such legacies are payable *pro rata*, and no one pecuniary legatee is allowed to gain a priority over others by suing for his legacy; and, therefore, the court must have an account of the pecuniary legacies, as well as of the personal estate, the debts, and the specific legacies, before it can know whether or not the plaintiff's legacy is to be paid in full, and, if not, then what proportion of it is to be paid.

Not only will the first decree be the same, in the case now supposed, as upon a bill by a residuary legatee, but all the subsequent proceedings will be the same, with one exception, namely, that, as the party or parties entitled to the residue will not be before the court, such residue will remain in court until such party or parties obtain payment of it by a petition to the court for that purpose.[1] It may be asked, indeed, how it is that the residue can be required to be paid into court, as the parties entitled to it are not before the court; and there is some technical difficulty upon that point. Still, as the decree is made for the benefit of all parties interested in the estate, except those entitled to the residue, and as the amount of the residue, if any, cannot be ascertained until the end of the suit, and as the payment of the whole fund into court must, in legal contemplation, be for the benefit of all parties interested in it, and cannot injure the executor, the technical difficulty has been disregarded.[2]

It must be observed, however, that no one can be bound by an accounting to which he was not a party, and, therefore, in the case now supposed, the party or parties entitled to the residue may require the executor to account over again upon a bill filed against him for that purpose; but of course it will be at the peril of costs, if they harass the executor with a second accounting without cause.

If the executor admit that he has sufficient assets to pay the plaintiff's legacy in full, the plaintiff will be entitled to no account, as he will need none; for he will be entitled to an immediate decree against the executor personally for the amount of his

[1] The question, whether a bill by a pecuniary legatee can be so framed as to enable the court to pay out the entire assets under the final decree in the suit, will be considered further on. See *infra*, p. 128 *et seqq.*

[2] See *infra*, p. 128 *et seqq.*

legacy. But it should be carefully observed that such a decree will afford the executor no protection against either a creditor or any other pecuniary legatee; for the executor had no right to make such an admission, unless he had sufficient assets not only to pay all debts, but also to pay all pecuniary legacies in full. In short, an admission of assets by an executor, upon a bill by a pecuniary legatee, means that the assets will be sufficient, after payment of all debts, and all specific legacies, if any, to pay all pecuniary legacies in full.

It will be seen, therefore, that, upon a bill by a pecuniary legatee against an executor, the testator's estate will or will not be administered, according as the executor is or is not required to give an account; and that he will be required to give an account unless he admits assets, while if he admits assets, he will not.

We now come to the case of a bill by a creditor against the executor to recover his debt; and the question is, whether such a bill can be so moulded as to serve the purpose of administering the estate. At first sight, it may seem that such a bill does not differ materially from a bill by a pecuniary legatee to recover his legacy. In truth, however, there is a very important difference between the two, — a difference, too, which is decisive of the present question.[1] All pecuniary legatees must, as we have just seen, be paid ratably, and no one of them can gain a priority over the others by suing for his legacy; but this is not true of creditors, — not even of those who are of the same degree. On the contrary, it is not only legally possible for any creditor of a deceased debtor to gain a priority by superior diligence over every other creditor of the same degree, but such is the inevitable consequence of any creditor's first recovering either a judgment at law or a decree in equity for his debt. That such is the law is perfectly well known; but it is doubtful if the reason of it is very well understood. In particular, it is believed that judgments against an executor are often confounded with judgments against his testator. It is true that a judgment of either class gives to the person who recovers it a right to priority of payment by the executor; but the reason is entirely different, according as the judgment belongs to the one class or the other. A judgment against a living debtor gives no priority to the creditor, except so

[1] *I.e.*, assuming that the bill is solely for the recovery of the plaintiff's debt. See *infra*, pp. 115–16.

far as the judgment is a lien upon the debtor's land;[1] but the moment the debtor dies, his judgment creditors are entitled, at common law, to be paid out of his personal estate in priority to other creditors; and the reason is that, when a debtor dies the common law ranks his creditors according to the nature of their debts, debts created by matter of record being the highest, and simple contract debts being the lowest. Judgment creditors, therefore, of a deceased debtor have a priority, not because they have obtained judgments for their debts, but because their debts are debts of record. The ranking of the creditors of a deceased debtor depends, however, entirely upon the nature of their debts at the moment of their debtor's death. Indeed, their nature cannot afterwards be changed without a destruction of them; and if, therefore, the executor of a deceased debtor converts a debt due by the latter into a debt of a higher nature, he thereby destroys it, and the new debt becomes his own.

How is it, then, that a judgment against an executor always gives the creditor a priority? The answer has just been suggested, namely, the judgment binds the executor personally. Moreover, an executor cannot prevent the recovery of a judgment against him, if he has sufficient assets to pay the debt, after paying debts of a higher nature; and, as the law compels him to pay a judgment so recovered, even if he pays it out of his own pocket, of course it must protect him, to that extent, against the claim of any other creditor, the existence of whose debt would not have prevented the recovery of the judgment, *i.e.*, against the claim of every other creditor whose debt, before the recovery of the judgment, was not of a higher nature than that of the judgment creditor. It is true that, in form, a judgment against an executor is commonly, in the first instance, *de bonis testatoris*, — not *de bonis propriis;* but, as every judgment against an executor *de bonis testatoris* is conclusive proof that the executor has sufficient goods of the testator to satisfy the judgment, the judgment is in effect *de bonis propriis*.[2]

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[1] If an execution is issued on the judgment, the creditor may also acquire a lien on personal property of the debtor, but not otherwise. See Finch *v.* Winchelsea, 3 P. Wms. 399, note. See also 1 Archbold's Practice (13th ed.), 522.

[2] What is said in the text suggests another important distinction between judgments against an executor and judgments against his testator, namely, that the former have priority according to their respective dates, while the latter all stand upon the same footing.

The effect of a decree in equity against an executor, at the suit of a creditor of his testator, in giving the creditor a priority, is even more decisive than that of a judgment at law; for a decree in equity binds the executor personally in form as well as in effect. The executor, as in the case of a bill by a pecuniary legatee, is required either to admit assets or to give an account. If he admit assets (and an admission of assets in this case means only that he has sufficient assets to pay the plaintiff, after paying all debts of a higher nature), the creditor will be entitled to an immediate decree against the executor personally. If the executor decline to admit assets, he will be required to give an account; but the account will be exclusively for the plaintiff's benefit, its object being merely to enable him to show that there are sufficient assets to pay him, after paying all debts of a higher nature. If the plaintiff succeed in showing this, he will be entitled, as before, to a decree against the executor personally. Indeed, equity was bound in self-defence to make its decrees against executors binding on them personally; for otherwise such decrees would have had no other effect than to prove the existence of the debt (as to which there is commonly no question), and hence creditors who sued in equity would have been put at a great disadvantage as compared with creditors who sued at law.

It may be thought that, upon a bill by a creditor, if the executor does not admit assets, there ought to be an account of all debts of a higher nature than the plaintiff's, and that the payment of all such debts ought to be provided for in priority to the plaintiff's; and equity might, indeed, have taken that course, but in fact it has not. On the contrary, equity has in that respect followed the analogy of an action at law, treating all debts of a higher nature as if they had in fact been paid, and so permitting the executor to show them in his account as items of discharge.[1] One reason for this may have been that equity did not think it worth its while to go out of its way to provide for the payment of a part only of the debts. Another reason may have been that equity regards the claims of all creditors as equal in point of justice, and therefore it was not disposed to go out of its way to assist one class of creditors, upon the ground that they had a priority over other creditors.

It follows, therefore, that a bill by a creditor to recover his own

[1] See Anon., 3 Atk. 572.

debt never involved providing for the payment of (and therefore never involved taking an account of) any other debts; and a creditor who filed such a bill had a right to insist that his suit should not be incumbered or delayed by the claims of any other creditors with which he had nothing to do; and for the court to have made such a suit the means of providing for the claims of other creditors, without the plaintiff's consent, would have been an act wholly arbitrary, and in plain violation of the plaintiff's rights. Nor would it probably have been thought a boon to the body of the creditors of the testator to be permitted to come in and prove their debts under a decree obtained by one of such creditors, if that one creditor must be paid in full before the others were provided for at all.

The conclusion, therefore, is that, upon a creditor's bill against an executor, the estate of the testator can never be administered without the plaintiff's consent. With his consent, however, it clearly may be done; for his rights are the only obstacle which stands in the way. If, therefore, a creditor files a bill, expressly disclaiming any priority over other creditors of the same degree, and praying that payment of all the debts may be provided for, according to their legal priorities at the time of the testator's death, there is every reason why the prayer of the bill should be granted; for it enables the court to administer the estate, and it is also promotive of one of the most cherished objects of equity, namely, equality among creditors. Moreover, this is precisely what takes place in the common case where a creditor files a bill against an executor, "on behalf of himself and of all the other creditors of the testator," the words quoted being held (and properly held) to mean all that is stated above. Accordingly, upon such a bill, the first decree will direct an account of the estate and of all the debts of the testator, and when the account has been taken, payment into court of the balance in the executor's hands will be directed, as upon a bill by a residuary legatee, and the court will proceed in all particulars as upon a bill by a residuary legatee, except that no account of legacies will be taken, nor any payment of them provided for; but the residue of the personal estate, after payment of the debts, will remain in court until paid out on the application of those entitled to it.[1]

The words which have been quoted in the last paragraph have

[1] See Collinson *v.* Ballard, 2 Hare, 119.

an effect even beyond what has been stated; for they convert the bill from a bill seeking a personal decree against the executor into a bill merely for the administration of a fund. It is clearly impossible upon such a bill for any one but the plaintiff to have a personal decree against the executor; and it is as clearly impossible to give the plaintiff any relief which cannot also be given to all the other creditors. Accordingly, upon a creditor's bill, filed on behalf of the plaintiff and all the other creditors of the testator, no personal decree is ever made against the executor; nor, indeed, is any final decree whatever made against him, the estate being fully administered as to him when it has been converted into money, and the money paid into court. Moreover, as the bill seeks, not a personal decree, but the administration of a fund, there is no propriety in the executor's admitting assets (the only object of which is to lay the foundation for a personal decree); and still less will an admission of assets by the executor exempt him from giving an account. He is not, therefore, given the option of accounting or admitting assets, but he is required to account unconditionally.[1]

Of course the technical objection to requiring an executor to pay all the money in his hands into court, upon a bill by a pecuniary legatee, holds still more strongly in the case of a bill by a creditor on behalf of himself and all the other creditors; but it has been disregarded in the latter case as well as in the former.[2]

As a creditor may file a bill on behalf of himself and all the other creditors, so a pecuniary legatee may file a bill on behalf of himself and all other pecuniary legatees. As, however, a bill by a pecuniary legatee involves the administration of the estate equally, whether it be filed for the plaintiff's exclusive benefit, or "on behalf of the plaintiff and all the other pecuniary legatees," unless, in the former case, the executor admits assets, the only effect of the words quoted is to convert the bill from a bill seeking a personal decree against the executor into a bill for the adminis-

[1] It follows, therefore, that a creditor should never leave it in doubt whether his bill is for his own exclusive benefit, or on behalf of himself and other creditors. See Reeve *v.* Goodwin, 10 Jur. 1050. In Woodgate *v.* Field, 2 Hare, 211, where the bill was by a creditor, on behalf of himself and other creditors, there was not only an admission of assets in the defendant's answer, but, on that admission, the plaintiff was permitted at the hearing to take a personal decree against the defendant. It seems, however, impossible to support the decision.

[2] See *infra*, p. 128 *et seqq.*

tration of the fund, and thus to require the executor to account absolutely, instead of giving him the option of admitting assets or accounting.

The next question is, How could creditors be induced to share equally with other creditors the fruits of a suit prosecuted by themselves alone? That they were so induced is clear; for bills by creditors, except on behalf of themselves and all other creditors, are, and have long been, very uncommon. Undoubtedly, equity might originally have made it a condition of its entertaining a suit by a creditor, that other creditors should be permitted to share in its benefits; for equity may always dictate the terms on which it will give to the owners of legal rights the benefit of equitable remedies. Perhaps, however, the absolute right of a creditor to sue in equity was too well established to be drawn in question before it was perceived that such a condition was desirable. Perhaps, also, the imposing of such a condition, while the jurisdiction was new, would have had little other effect than to discourage creditors from coming into equity. At all events, equity never imposed any such condition;[1] and at length it became too late to do so. It became necessary, therefore, to find some other means of accomplishing the same object; and other effective means were at length found.

Of course the fact that one creditor of a testator sues the executor of the latter, does not prevent any other creditor from suing him also; and the fact that one creditor sues him for his own exclusive benefit does not prevent another creditor from suing him on behalf of all the creditors. Moreover, if one creditor file a bill for his own exclusive benefit, and then another creditor file a bill on behalf of all the creditors, and the creditor in the second suit obtain a decree for an accounting before the creditor in the first suit obtains a personal decree against the executor, the proceedings in the first suit will be stayed, and the creditor in that suit will have to come in and prove his debt under the decree in the second suit; for it is a rule, the reason of which will be considered presently, that, after a decree is made under which an estate can be administered, no one who is entitled to come in under that decree will be permitted to prosecute any suit for his own exclusive benefit. Moreover, executors were encouraged to coöperate with any creditor who sued on behalf of all the creditors, and thus enable him to obtain a

[1] See *infra*, p. 132, n. 2.

decree before any creditor who sued for his own exclusive benefit could gain a right to a priority of payment; and this was finally carried to such a length that an executor was permitted to commit the absurdity of suing himself, *i.e.*, of filing a bill against himself in the name of a creditor (whose consent, of course, he must obtain), the same attorney confessedly acting for both plaintiff and defendant.[1] If, however, it was suspected that an executor was using this privilege as a means of delaying creditors and keeping the money in his own hands, it was open to any creditor to make an application to the court to have the prosecution of the suit committed to himself or to some other creditor, and such an application was always listened to with favor.[2]

An executor, however, who honestly desired to prevent any one creditor from gaining a priority over others by obtaining a personal decree against himself, could easily do so in the manner pointed out in the last paragraph; [3] and, therefore, a creditor who sued an executor for his own exclusive benefit was confronted with the moral certainty, not only of failing in his object, but also of losing the benefit of conducting a suit for the administration of the estate. It is not surprising, therefore, that bills for the exclusive benefit of the creditor who filed them were superseded by bills for the equal benefit of all the creditors.

It must not, however, be supposed that all the obstacles which equity encountered in its attempts to administer the estates of deceased persons had yet been overcome. It had, indeed, been shown that suits by creditors of a testator could be so framed as to serve the purpose of administering the testator's estate, and means had been found of compelling creditors so to frame their suits; and, incidentally, means had been found of defeating the attempts of particular creditors, by suits in equity for their own exclusive benefit, to gain priority over other creditors of the same degree. But it was still possible for one creditor to gain priority

[1] Paxton *v.* Douglas, 8 Ves. 520, 522, *per* Lord Eldon; Gilpin *v.* Lady Southampton, 18 Ves. 469–470, *per* Lord Eldon.

[2] Paxton *v.* Douglas, 8 Ves. 520, 521–2, *per* Lord Eldon; Sims *v.* Ridge, 3 Mer. 458; Powell *v.* Wallworth, 2 Madd. 183; Hawkes *v.* Barrett, 5 Madd. 17. See also Spode *v.* Smith, 3 Russ. 511.

[3] In Hayward *v.* Constable, 2 Y. & Coll. 43, it appeared that an administration bill was filed Feb. 8, that the executor's answer was filed Feb. 11, and a decree made Feb. 12. In Hawkes *v.* Barrett, 5 Madd. 17, a bill was filed Dec. 15, the executors answered immediately, and a decree was made Dec. 22. One of the executors also was solicitor for both plaintiff and defendants, and the other executor was residuary legatee.

over others by obtaining a judgment at law against the executor; and, unless some means could be found of preventing that, no creditor would find it worth his while to file a bill in equity on behalf of himself and all the other creditors for the administration of the estate, and every insolvent estate of a deceased debtor would be exhausted in a ruinous struggle among the creditors for priority, or at best every executor whose testator's estate was insolvent would be forced to give a preference to those creditors whom he most favored by either paying them in full (so long as he had assets for the purpose), or by confessing judgments in their favor. In short, it was in vain for equity to prevent any one creditor from gaining a priority over the others in equity, unless he could also be prevented from doing the same thing at law. Could a creditor be so prevented? Clearly, only in one way, namely, by an injunction. Could, then, any principle be found upon which an injunction could be granted against a creditor who was seeking to recover his debt by an action at law? An injunction was granted in such a case for the first time in Morrice *v.* The Bank of England;[1] but it was upon a ground so special and so narrow that the decision left the jurisdiction of equity over the estates of deceased persons about where it found it. An executrix was there sued at law by many creditors of her testator after certain other creditors (whose debts were due only in equity) had obtained decrees against her in equity, in suits prosecuted for their own exclusive benefit; and, on a bill filed by her, an injunction was granted against the prosecution of the actions at law; but it was only upon the ground that the executrix was there placed between two fires. On the one hand no judgments which could be recovered against the executrix would protect her against the decrees, because the latter were made first, and equity could not possibly permit its decrees to be disobeyed because of what some other court had done since those decrees were made.[2]

[1] Cas. *t.* Talbot, 217, 3 Swanst. 573, 2 Bro. P. C. (Toml. ed.) 465.

[2] Morrice *v.* Bank of England was decided successively in the plaintiff's favor by Sir Joseph Jekyll, M. R. (before whom it was argued for six days), by Lord Chancellor Talbot (before whom it was argued for seven days), and by the House of Lords (before which it was argued for six days); and it may, therefore, be thought presumptuous to criticise the decision. The writer has, however, found himself wholly unable to support it. The difficulty is, that the facts do not bring the case within the reasons given for the decision, — a difficulty which does not appear to have been at all adverted to, either by counsel or by courts. The decrees did not bind the executrix personally, and were not intended to do so. A personal decree against an executor must be based either upon

On the other hand, the decrees would be no protection to the executrix at law, because, in the judgment of a court of law, a decree in equity is nothing. In short, equity must insist upon obedience to its decrees; and, therefore, as the executrix could not render such obedience without incurring liability at law, equity must protect her against such liability. The decision, however, did not warrant an injunction until a creditor had obtained a personal decree against the executor in equity, and, therefore, not until a creditor had accomplished in equity the very purpose which it was the object of an injunction to prevent a creditor's accomplishing at law; and that is the reason why the decision exerted so little influence over the administration of assets in equity.

It was not, however, the fault of the court that the decision in Morrice *v.* The Bank of England was placed upon so narrow a ground; for it has never been claimed that a suit in equity by a creditor, prosecuted for the plaintiff's exclusive benefit, could furnish any broader ground for an injunction. It is otherwise, however, of a suit in equity which is so framed that it will result in

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an admission of assets by him, or upon an accounting which shows the amount of assets in his hands; but in Morrice *v.* Bank of England the executrix had neither admitted assets nor accounted. In her answer she had expressly declined to admit assets; and, though an account of the personal estate was directed by the decree, it had not yet been taken. If, therefore, the decrees had been so framed as to bind the executrix personally, they would not have been final (and, therefore, would not have bound her personally) until the account was taken, as it would not be known till then for what amount the executrix would be bound. The decrees were not, however, so framed. On the contrary, they simply directed the executrix to pay the plaintiff's claims out of the assets in her hands, and in a due course of administration. Although, therefore, the decrees were final, they did not bind the executrix personally. In truth, they had no other effect than to establish the plaintiff's claims and fix their amount. The plaintiffs seem to have supposed that any final decree would give them a priority, thus confounding judgments and decrees against executors with judgments and decrees against living debtors. The latter, of course, always bind the defendant personally; and, therefore, all that is necessary to give them full and complete effect is that they be final. Smith *v.* Haskins Stiles Eyles, 2 Atk. 385. But, as to judgments and decrees against executors, the question is not whether they are final (though they must indeed be final), but whether they require the executor to pay absolutely or only out of assets. The case of Abbis *v.* Winter, 3 Swanst. 578, note, seems to show that the reason why a judgment or decree against an executor gives priority to the creditor who obtains it was not very well understood at the time when Morrice *v.* Bank of England was decided. In Smith *v.* Birch, 3 Beav. 10, the decree was neither binding on the executor personally, nor final. See also Ashley *v.* Pocock, 3 Atk. 208; Gaunt *v.* Taylor, 3 M. & Gr. 886; Dollond *v.* Johnson, 2 Sm. & Giff. 301; Jennings *v.* Rigby, 33 Beav. 198; Williams *v.* Williams, L. R. 15 Eq. 270; Hanson *v.* Stubbs, 8 Ch. D. 154.

the administration of the entire estate; for the first decree in such a suit is in effect a declaration that the court takes possession of the entire estate for the purpose of administering it; and, therefore, no other court can be permitted to enforce any claim against it. The moment that such a decree is made, the executor becomes amenable to the court which makes the decree, in respect to all his official acts; and hence that court will not thereafter permit any of the executor's official acts to be either directed or questioned by any other court. Such a decree has in fact the same effect, in giving the court exclusive jurisdiction over the estate, that the appointment of a receiver would have. It does not, indeed, and cannot, convert the executor into a receiver. The executor's legal rights and legal duties remain unchanged, and the exercise of the one and the performance of the other are interfered with only so far as the purposes of justice require. Accordingly, the executor is left for the most part to convert the estate into money, without interference; but when the estate has been converted into money, the court reserves to itself the disposition of that money, and, therefore, the executor is required, as has been seen, to pay it into court, and if he pays any of it out in the discharge of the testator's debts or legacies, he will do so at his peril, as the court will give him no other protection than to permit him to stand in the place of those whom he has paid.[1]

The conclusion therefore is, that as soon as a decree is made against an executor, under which the entire estate of his testator will be administered, or (in other words) under which the executor will be required to pay the proceeds of the whole estate into court, an injunction ought to be granted against the enforcement of any claim against the estate by an action at law; and accordingly such has been the established rule for more than a hundred years. An injunction was granted, under such circumstances, for the first time, by Lord Camden, in 1767, in the case of Douglas *v.* Clay;[2] but the reasons of the decision have not been reported, and the injunction may have been granted on a special ground; for the executor was there sued at law by the very persons who had obtained the decree in equity against him, and who may, therefore, have been held to have made their election between law and equity. The

[1] Jones *v.* Jukes, 2 Ves. Jun. 518; Mitchelson *v.* Piper, 8 Sim. 64; Irby *v.* Irby, 24 Beav. 525.

[2] Cited in Brooks *v.* Reynolds, 1 Bro. C. C. 183, 184; s. c. Dick. 393.

first injunction that was granted expressly upon the ground above explained was that granted by Lord Thurlow, in 1782, in the case of Brooks *v.* Reynolds;[1] and though it is doubtful whether that was a case in which the estate could properly be administered, yet a decree for the administration of the estate had in fact been made, and the correctness of that decree could not of course be questioned in a collateral proceeding. The decision in Brooks *v.* Reynolds was not, however, sufficient to settle the question; for in the subsequent case of Kenyon *v.* Worthington,[2] in which the question arose nakedly and upon its merits, an application to Lord Thurlow for an injunction was resisted by counsel of the greatest eminence. The resistance, however, was unsuccessful, and the injunction was granted. This was in 1786; and from that time the question was regarded as settled.[3]

The practice thus established involved from the beginning one danger (already adverted to in another connection), namely, that executors would sometimes make it a means of delaying creditors, and of keeping the assets in their own hands. This danger was, however, effectively guarded against by making it a condition of granting an injunction, that the executor make an affidavit as to the state of the assets, and pay into court whatever money was then in his hands.[4]

There was also a serious objection, in point of procedure, to the practice established by Lord Thurlow, namely, that it was expensive and cumbersome; for it made it necessary for every executor

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[1] 1 Bro. C. C. 183, Dick. 603. That was a bill by an executrix to restrain a creditor of her testator from suing her at law. An administration decree had been made against the executrix, upon a bill filed by trustees under the testator's will. Possibly the decree was right, as the trustees were residuary legatees; and Lord Eldon (in Perry *v.* Phelips, 10 Ves. 34, 39) speaks of the bill as having been filed by residuary legatees. Still, the trustees filed the bill professedly to obtain the directions and indemnity of the court in executing the trust, and all the *cestui que trusts* under the will, as well as the executrix and the testator's heir at law, were made defendants; and, therefore, the bill seems to have been in the nature of a bill of interpleader. Dickens says (doubtless by mistake) the bill was filed by a creditor on behalf of himself and the other creditors.

It may be further observed that the plaintiff's object in seeking an injunction confessedly was, not to prevent the defendant from obtaining a preference over other creditors (for the estate was admitted to be solvent), but to protect against creditors a large amount of property specifically bequeathed to the plaintiff herself.

[2] Dick. 668.

[3] Paxton *v.* Douglas, 8 Ves. 520; Perry *v.* Phelips, 10 Ves. 34; Curre *v.* Bowyer, 3 Madd. 456; Clarke *v.* Earl of Ormonde, Jac. 108, 123-5.

[4] Cleverley *v.* Cleverley, cited 8 Ves. 521; Paxton *v.* Douglas, 8 Ves. 520; Gilpin *v.* Lady Southampton, 18 Ves. 469; Clarke *v.* Earl of Ormonde, Jac. 108, 125.

against whom an administration decree was obtained, as often as he was sued at law by any creditor of his testator, to file a bill against such creditor (*i.e.*, commence and prosecute a suit against him) for the sole purpose of obtaining an injunction; and the fact that administration suits were so very numerous made this objection all the more serious. Still, it was an objection which courts of equity could not themselves remove without introducing arbitrarily a great anomaly in procedure; and it was, therefore, a proper case for legislation. It was not easy, however, a hundred years ago, to obtain legislation in England for such a purpose; and, therefore, the question was, whether a serious practical inconvenience should be submitted to, or whether principle should be sacrificed; and the latter alternative was the one adopted. In the time of Lord Loughborough, the practice began of granting the injunction, without requiring any bill to be filed, *i.e.*, upon a motion made by the executor in the administration suit; [1] and this was in effect, not only giving relief upon motion, but it was giving relief upon a motion made in a suit in which such relief could not possibly have been given by decree; for it was entirely foreign to the case made by the bill, and it was given, not to the plaintiff in the suit, but to the defendant — not against the defendant, but against a total stranger to the suit.

Nor was the anomaly limited to the granting of injunctions on the application of the executor, without requiring him to file a bill; for it afterwards became the practice to grant them equally upon the application of the plaintiff in the administration suit,[2] — a still greater violation of principle. The granting of them without requiring a bill to be filed was in itself, of course, a violation only of the principles of procedure, but the granting of them on the application of the plaintiff in the administration suit was a violation of the rights of the parties; for the executor was the only person who had a right to an injunction; [3] and if the plaintiff in the administration suit had filed a bill for an injunction against a creditor who was suing the executor at law, the bill would clearly have been bad on demurrer. In short, while the granting of the injunction on the motion of the executor was

[1] Paxton *v.* Douglas, 8 Ves. 520; Clarke *v.* Earl of Ormonde, Jac. 108, 124, *per* Lord Eldon. See also Hardcastle *v.* Chettle, 4 Bro. C. C. 163.

[2] Clarke *v.* Earl of Ormonde, Jac. 108, 125; Dyer *v.* Kearsley, 2 Mer. 482, note.

[3] Clarke *v.* Earl of Ormonde, Jac. 108, 122, *per* Lord Eldon.

merely granting relief without a suit, the granting of it on the motion of the plaintiff in the administration suit was granting relief without a suit to a party who could not have obtained it by a suit.

As soon as it was settled that all actions at law by creditors against an executor would be stopped as soon as a decree was obtained against men for the administration of the testator's estate, of course it followed that, in the like event, all other suits in equity against him, prosecuted by creditors for their own exclusive benefit, would also be stopped.[1] Nor did the stopping of the latter involve any such difficulties of procedure as did the stopping of the former; for there was but one Court of Chancery, and all the courts of equity held by the different judges were branches of the Court of Chancery; and, therefore, when an administration decree was obtained against an executor in one suit, the proceedings in every other suit in equity against him were stayed upon a motion made by him in that suit. Moreover, since the passage of the Judicature Acts, what was always true of courts of equity has become true of courts of common law as well; for both classes of courts are now but branches of one Supreme Court. An injunction, therefore, is no longer necessary to stay the proceedings in an action at law against an executor; but a stay can be obtained upon a motion made by the executor in the action which is sought to be stayed.

At length, therefore, every executor acquired the means of having the personal estate of his testator administered in equity, and of having it divided among the several persons who had claims upon it, according to their respective rights as they stood at the time of the testator's death, and that too in spite of anything that the testator's creditors could do with a view to obtaining a priority over each other.

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[1] There may be two concurrent suits in equity against an executor, both of which are for the administration of the testator's estate; and in that case, while neither suit can be stayed until a decree is obtained in the other, it does not follow that, when a decree is obtained in one, the other will be stayed. If the suit in which a decree is first obtained embraces everything which the other suit embraces, so that the plaintiff in the latter can have everything that he seeks in his own suit by coming in under the decree already made, then the proceedings in the other suit will be stayed. Otherwise, the latter suit will be permitted to go on. And if that embraces everything which is embraced in the suit in which the decree has been obtained, the proceedings in the latter will be stayed. See Coysgarne *v.* Jones, Ambl. 613; Law *v.* Rigby, 4 Bro. C. C. 60; Pott *v.* Gallini, 1 S. & St. 206; Jackson *v.* Leaf, 1 Jac. & W. 229.

So, too, every creditor, legatee, and next of kin of a deceased person acquired the means of having the estate of the deceased administered in equity; but creditors never acquired the means of preventing an executor from giving a preference to one creditor of his testator over other creditors of the same degree. Executors had a right to give such a preference at common law, and equity never discovered any means of preventing them from doing it until an administration decree was obtained against them,[1] and of course an executor could delay a creditor considerably in obtaining such a decree. If, however, an executor prefer a creditor by paying him a part of his debt, and afterwards a decree is made for the administration of the estate, the creditor so preferred will not be allowed to receive anything under the decree until the other creditors have received the same proportions of their debts that he has received of his.[2]

Can the estate of a deceased person be administered upon a bill filed by his executor? To this question, the authorities furnish no certain answer;[3] but, upon principle, it seems clear that the answer must be in the negative. If an executor file such a bill, he must do so, not as a person having claims to enforce, but as a person against whom claims are made. He is, therefore, properly the defendant to such a bill; and the bill is properly filed by a creditor, legatee, or next of kin. What right, then, has the executor to reverse this state of things? When a person against whom a claim is made, instead of waiting to be sued, brings a suit himself against the claimant to have the claim against himself disposed of, he must have some special reason for doing so. What reason is there in the case now supposed? If, indeed, there is a controversy as to the persons who are entitled to the estate of a deceased person after his debts are paid, or as to the proportions in which the several claimants are entitled, the executor may undoubtedly file a bill against the claimants; but such a bill is in

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[1] Waring *v.* Danvers, 1 P. Wms. 295. In the Matter of Radcliffe, 7 Ch. D. 733, Jessel, M. R., said the only way of preventing preferences by executors, before an administration decree was obtained, was by procuring the appointment of a receiver. A receiver cannot, however, be appointed unless there is misconduct in the executor (Anon., 12 Ves. 4); and the preferring of one creditor to another — an act which is perfectly legal — cannot be deemed misconduct.

[2] Wilson *v.* Paul, 8 Sim. 63.

[3] See Fielden *v.* Fielden, 1 S. & St. 255; Newman *v.* Norris, Dick. 259; Rush *v.* Higgs, 4 Ves. 638; Davis *v.* Combermere, 15 Sim. 394.

the nature of a bill of interpleader, and clearly no creditor of the testator can properly be a party to it. Such a bill, indeed, assumes that all the debts are paid; and it is very doubtful if it does not assume that all legacies about which no question is raised are also paid.

A notion seems to have once prevailed that an executor whose testator died insolvent might maintain a bill against the creditors of the latter, for the express purpose of procuring the estate to be divided among all the creditors *pro rata*, with such preferences only as existed by law at the time of the testator's death, and in Buccle *v.* Atleo[1] a demurrer to a bill of that description was overruled. Such a bill would be primarily a bill to restrain the testator's creditors from suing the executor at law; but as a consequence of that would be that the creditors would be deprived of their legal remedy, equity must provide them with another remedy; and, therefore, the decree, after directing an injunction to issue, would refer the cause to a Master to take an account of the estate and of the debts, with a direction to the Master to advertise for creditors to come in before him and prove their debts.[2] There would be but one objection to such a decree, but that would be conclusive, namely, that equity would be depriving creditors of their legal rights for no other reason than that it disapproved of their having such rights. Accordingly, the notion that such a bill would lie has long been exploded.[3]

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[1] 2 Vern. 37.

[2] Such a decree was made in Morrice *v.* Bank of England, *supra*, p. 120; and, therefore, in that case the estate was administered in a suit in which the executrix was plaintiff. Whenever equity restrains the owner of a legal claim from enforcing his claim at law, it must itself take cognizance of and enforce the claim. When, indeed, an administration decree has been made against an executor, and he thereupon files a bill to restrain a creditor from suing him at law, the court has no occasion to do more upon the latter bill than decree an injunction; but that is because there is already a decree under which the creditor can come in.

[3] See Backwell's Case, 1 Vern. 152; Morrice *v.* Bank of England, Cas. *t.* Talbot, 217, 224-5, 3 Swanst. 573, 583, *per* Lord Chancellor Talbot. In the latter case it appears from 2 Bro. P. C. (Toml. ed.) 465, 481, that a bill had been filed by some of the creditors of Morrice, on behalf of themselves and the other creditors, to compel a *pro rata* division of the estate among all the creditors; but the bill was demurred to, and the demurrer was allowed. The difficulty in the plaintiffs' way was that they were in no condition to obtain an injunction. According to the practice afterwards established, the plaintiffs would have filed a bill simply for the administration of the estate; but whether such a bill would have done them any good or not, ought to have depended upon whether they could obtain an administration decree before those creditors whom the executrix wished to prefer could, with the assistance of the executrix, obtain a personal decree against the latter.

In spite of all that we have said in vindication of administration bills, it must be confessed that they still leave something to be desired. It has been seen that, upon a bill filed by a creditor on behalf of himself and all the other creditors, the final decree can direct payment to none but creditors, and that, upon a bill filed by a pecuniary legatee on behalf of himself and all other pecuniary legatees, the final decree can direct payment to none but creditors and specific and pecuniary legatees. It has also been seen that there is a difficulty in requiring all the assets to be paid into court in a suit, by the final decree in which they cannot all be paid out. Can, then, a bill by a creditor, or by a pecuniary legatee, be so framed that the final decree upon it can direct the distribution of the entire estate? In other words, can such a bill be filed on behalf, not merely of the plaintiff and the other members of the class to which he belongs, but of all persons who are interested in the estate, or who have claims upon it? It seems to have been generally supposed that it cannot. Why? Because it has been generally supposed that a creditor or legatee who files a bill on behalf of himself and others represents those others in the suit, and hence that the latter are constructively plaintiffs in the suit; and if this were so, it would follow that all those on whose behalf the bill is filed must constitute a class; for no one can be a constructive plaintiff in a suit who could not also be a nominal plaintiff, and all the plaintiffs in a suit, whether nominal or constructive, must be capable of acting together as a unit, and hence, if they have not all one right, they must at least have one and the same case to establish.

But is it true that all those, on whose behalf a creditor or a pecuniary legatee of a testator brings a suit against the executor, are plaintiffs in the suit? It seems not. First, none but the nominal plaintiff or plaintiffs are treated by the decree as plaintiffs. For example, the first decree when the suit is by a creditor directs the Master to take an account of what is due to the plaintiff and all the *other* creditors of the testator, and, after directing the Master to cause an advertisement to be published for the creditors to come in before him and prove their debts, the decree proceeds: "but the persons so coming in to prove their debts, *not parties to this suit*, are, before they are to be admitted as *creditors*, to contribute to the plaintiff their proportion of the expense of this suit,

to be settled by the Master."[1] So when the decree, in a suit either by a creditor or by a pecuniary legatee, directs that all the parties to the suit shall have their costs, to be paid out of the estate, only the nominal parties are included.[2] So too the final decree in a creditor's suit, while it provides for the payment of all creditors who have come in before the Master and established their claims, never speaks of them as parties to the suit, but refers to them as persons named as creditors in the schedule to the Master's report.[3] Secondly, none but the nominal plaintiff or plaintiffs are plaintiffs in fact. Until after the first decree is made, none but the nominal plaintiff or plaintiffs have anything to do with the suit, nor are in any manner affected by it; and those who do not choose to come in under the decree, forever remain total strangers to the suit; and yet every one who is constructively a plaintiff in a suit is so from the beginning, and is interested in and bound by everything that is done in it, and he may, therefore, apply to the court for leave to take part in its prosecution. Even those who come in under the decree in a suit by a creditor or legatee do not thereby become, constructively or otherwise, plaintiffs in the suit. It is true that, if their claims are investigated and rejected, they will be bound by the decision,[4] but that is because their claims have been tried; and though the trial may have been informal, yet it was had on their own application. Moreover, it is not the decree in the cause, but the Master's report and the confirmation of it by the court, that binds them. That those who come in under the decree are not represented by the nominal plaintiff or plaintiffs, appears also from the fact that, so far as they are represented in the suit at all, they severally represent themselves. So far are they, indeed, from being represented by the plaintiff, that they may contest the plaintiff's claim (as they may the claims of each other) in the Master's office. Thirdly, there is no necessity that all those on whose behalf the suit is brought should be constructive plaintiffs in the suit. When the suit is by a residuary legatee or next of kin, it will not be seriously claimed that the

[1] Seton on Decrees (1st ed.), p. 51.

[2] Creditors who come in under an administration decree do not even receive the costs of proving their debts. Abell *v.* Screech, 10 Ves. 355; Harvey *v.* Harvey, 6 Madd. 91; Waite *v.* Waite, 6 Madd. 110.

[3] Seton on Decrees (1st ed.), p. 58.

[4] See Neve *v.* Weston, 3 Atk. 557; Teed *v.* Beere, 28 L. J., Chan., 782; Barker *v.* Rogers, 7 Hare, 19; Thomas *v.* Griffith, 2 De G., F. & J. 555.

creditors and legatees who come in under the decree are constructive plaintiffs in the suit; and yet those who come in under the decree in such a suit stand in the same relation to the suit as those who come in under the decree in a suit by a creditor or pecuniary legatee. The only difference that exists is in the reason for their being let in. In the one case they are let in because the letting of them in is a *sine qua non* of the plaintiff's obtaining the relief which he seeks, while, in the other case, they are let in because the plaintiff voluntarily consents to their being let in. Fourthly, the creditors or pecuniary legatees of a testator do not constitute a class of persons in such a sense that they can all be made co-plaintiffs in a suit, either constructively or nominally. That they cannot all unite as nominal plaintiffs is clear; for not only has each of them, presumably, a separate and distinct right, but the right of each, presumably, depends upon a wholly separate and distinct case. Indeed, if any two creditors or pecuniary legatees of the same testator (not being joint creditors or legatees) should unite in filing a bill for the recovery of their respective debts or legacies, their bill would be bad for multifariousness. And yet the sure mode of testing the question, whether a given class of persons can be made constructively co-plaintiffs (one of their number being the nominal plaintiff), is to inquire whether they could all unite as nominal co-plaintiffs; for there is but one reason for permitting persons to be made constructive parties to a suit, namely, that they are so numerous that it is inconvenient to make them all nominal parties.

But even if all pecuniary legatees, and all creditors whose debts are of the same degree, constitute each a class, for the purposes of the question now under consideration, it will not follow that all creditors, whatever their degree, also constitute a class. A creditor by judgment or by specialty differs as much, for the purposes of the present question, from a creditor by simple contract as the latter does from a pecuniary legatee; and yet no one will claim that creditors and pecuniary legatees can be made co-plaintiffs, either constructively or nominally. To claim, therefore, that all the persons on whose behalf a suit is brought by a creditor or a pecuniary legatee are constructive co-plaintiffs is to claim that the practice which has always prevailed is erroneous; for it has always been the practice for creditors to file their bills on behalf of themselves and all other creditors, of whatever

degree;[1] and, indeed, any other practice would have been attended with the greatest inconvenience, so long as the debts of deceased persons had priority according to their respective degrees.

Undoubtedly, it has been common for two or more creditors or pecuniary legatees to unite in filing a bill on behalf of themselves and all other creditors or pecuniary legatees; but that practice has arisen from the error of supposing that those who file the bill represent all those on whose behalf it is filed; for it is well known that, when the plaintiffs in a suit constitute a class of persons, some of whom are made plaintiffs by representation, the bill not only may, but should, be filed by more than one member of the class, in order that the court may have more security than the presence of a single member of the class would afford that the interests of those who are present only by representation will be properly cared for.

Upon the whole, therefore, it seems that those on whose behalf an administration bill is filed are not represented by the person who files the bill, and therefore they need not constitute a single class of persons, but may comprise all persons who are interested in the estate to be administered, or who have claims upon it; and it seems desirable that, in many cases at least, administration bills should be filed on behalf of all the persons just named. Undoubtedly there is a wide distinction between creditors, on the one hand, and legatees or next of kin, on the other; and there may be litigation or other causes of delay affecting the latter with which the former are not concerned, and by which, therefore, they ought not to be delayed in obtaining payment of their debts. It does not follow, however, because a bill is filed on behalf of legatees or next of kin, as well as of creditors, that the creditors must wait for the payment of their debts until the claims of legatees or next of kin can also be satisfied; for, when the first decree is made, referring the cause to a Master, the Master may be directed to

[1] It has, indeed, been made a question whether a secured creditor can file a bill on behalf of unsecured creditors. Thus, in Burney *v.* Morgan, 1 S. & St. 358, 362, Sir John Leach, V. C., said: "A mortgagee has no common interest with the creditors at large, and cannot sue on their behalf." So in White *v.* Hillacre, 3 Y. & Coll. 597, it was held that a mortgagee could not sue both as mortgagee and also on behalf of himself and all other creditors of the debtor, such rights of suing being inconsistent with each other. On the other hand, in Skey *v.* Bennett, 2 Y. & Coll. C. C. 405, it was held that a mortgagee may maintain a bill on behalf of himself and all the other creditors of the deceased mortgagor. And see *infra*, pp. 134–5.

make a separate report as to creditors as soon as the reference is completed as to them; and, as soon as such report is made and confirmed, the cause may be set down for a further hearing, and a decree made for the payment of the creditors, leaving the cause to proceed as to legatees or next of kin.[1]

If it be asked what inducement a creditor can have to file a bill on behalf of legatees or next of kin, it may be answered that he has the same inducement that he has to file a bill on behalf of other creditors than himself, namely, the avoiding of the risk of having his bill superseded by a bill filed by a residuary legatee or a next of kin, or even by another creditor on behalf of the legatees or next of kin as well as of the creditors.

Thus far it has been assumed that the creditors of a testator were seeking payment of their debts out of his personal estate alone. But bond creditors were always entitled to be paid out of the testator's real estate, if his personal estate proved deficient; and, therefore, when a bond creditor of a deceased debtor filed a bill to compel payment of his debt, he was entitled to make the debtor's heir or devisee, as well as his executor, a defendant to the bill, and it was necessary for him to do so, if he wished to avail himself of his remedy against the real estate. It was also necessary that he should file his bill on behalf of all the bond creditors of the testator; otherwise the heir or devisee might demur.[2] The reason of this was that such a bill, as against the heir or devisee, was a bill to have the testator's real estate, or a sufficient part of it, sold or mortgaged, under the direction of the court, for the payment of the testator's bond debts; and, as this

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[1] See Golder *v.* Golder, 9 Hare, 276.

[2] Bedford *v.* Leigh, Dick. 707; Johnson *v.* Compton, 4 Sim. 37; May *v.* Selby, 1 Y. & Coll. C. C. 235; Pousford *v.* Hartley, 2 J. & H. 736; Worraker *v.* Pryer, 2 Ch. D. 109; Fryer *v.* Royle, 5 Ch. D. 540. The better view, however, would seem to have been that the decree should be for the benefit of all the bond creditors, whether the bill was in terms on their behalf or not; and that view appears to have formerly prevailed. Martin *v.* Martin, 1 Ves. 211, 213-14; White *v.* Hillacre, 3 Y. & Coll. 597, 610, note. As a bond creditor is entitled to a remedy in equity against the heir or devisee only on the terms of his permitting all other bond creditors to share in the benefit of his suit, the mere fact of his making the heir or devisee a defendant to his bill ought, it seems, to be deemed sufficient evidence, unless the contrary appears, that he intends his bill to be for the benefit of all the bond creditors. See Cowper *v.* Blissett, 1 Ch. D. 691; Worraker *v.* Pryer, 2 Ch. D. 109. The view stated in the text seems to have originated in the idea that, when the bill is in terms on behalf of all the other bond creditors, the latter become constructively co-plaintiffs in the suit, and hence that a bill which is not in terms on behalf of all the bond creditors is defective for want of parties. See *supra*, p. 128 *et seqq.*

was a proceeding which required considerable time, and involved considerable labor and expense, considerations of convenience and economy demanded that it should be gone through with once for all;[1] and, therefore, no creditor was permitted to file such a bill solely for his own benefit. The bill ought also, for a reason which will appear presently,[2] to be on behalf of the simple contract creditors as well as of the other bond creditors; but the only penalty that the plaintiff incurred by not so framing his bill was the risk of having it superseded by the bill of some other creditor more properly framed. It is indispensable, too, that the executor be a co-defendant with the heir or devisee, as the latter are entitled to have the personal estate exhausted before the real estate is resorted to; and it is only by making the executor a co-defendant that it can be ascertained whether and to what extent the personal estate is insufficient for the payment of debts.[3]

The first decree, upon a bill to which the heir or devisee is made a defendant, will first direct an administration of the personal estate, just as if the executor were the sole defendant; and if the personal estate be found by the Master to be insufficient to pay the debts in full, he will be directed to inquire and report to the court what real estate, if any, the debtor left.[4] If the Master report the personal estate to be insufficient to pay the debts, and that the debtor left real estate, the cause will be set down for a further hearing, and a second decree will be made directing the Master to cause the amount in which the personal estate is deficient to be raised by a sale or mortgage of the real estate, or a sufficient part thereof, and the money so raised to be paid into court; and if the required amount cannot be raised by a sale of the real estate, the Master will be directed to take an account of the rents and profits of such real estate from the time of the testator's death to the time of the sale; and when the amount of such rents and profits shall thus be ascertained the same will also be required to be paid into court. When the

[1] It is obvious, too, that real estate can generally be sold to much better advantage if it is known from the beginning how much will have to be sold, or rather how much money will have to be raised.

[2] See *infra*, pp. 136–7.

[3] Plunket *v.* Penson, 2 Atk. 51; 4 Harvard Law Review, pp. 126–7; Rowsell *v.* Morris, L. R. 17 Eq. 20; Dowdeswell *v.* Dowdeswell, 9 Ch. D. 294. But see Ambler *v.* Lindsay, 3 Ch. D. 198.

[4] Seton on Decrees (1st ed.), pp. 134–5.

directions in the decree have been fully carried out, and the Master has made his report, and his report has been confirmed, the cause will be set down again, and a third and final decree will be made, the terms of which will be the same, *mutatis mutandis*, as those of the final decree in a suit against the executor alone.

As soon as the second decree is made, all proceedings at law against the heir or devisee will be enjoined on the application of the latter, and for the same reason that all proceedings at law against the executor will be enjoined on his application as soon as the first decree is made;[1] and it is somewhat remarkable that this principle was established as to heirs and devisees before it was established as to executors.[2]

A creditor of a living debtor who has a lien upon the property of the latter for the security of his debt may first sue the debtor personally for the debt, and, if he fail to obtain payment in full by that means, he may then realize upon his security; or he may first realize upon his security, and, if that prove insufficient to pay the debt in full, he may then sue the debtor personally for what still remains due to him. If he be able to realize upon his security without a suit, an action at law against the debtor personally will give him, in either case, all the judicial assistance that he will need. But if he can realize upon his security only by a suit in equity (*e.g.*, where a mortgagee can procure a sale of the mortgaged property only by a suit in equity for that purpose), a suit in equity, as well as an action at law, will in each case be necessary; and the only question with the creditor will be whether he will first sue at law and then in equity, or first in equity and then at law.

What is thus true of a creditor of a living debtor is also true, *mutatis mutandis*, of a creditor of a deceased debtor who has a lien upon property of the latter, except that, in the case of a creditor of a deceased debtor, one suit in equity against the representative or representatives of the debtor will answer every purpose. In such a suit, the bill may be framed just as it would be if the creditor had no security,[3] except that it will pray (by way of additional

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[1] Sumner *v.* Kelly, 2 Sch. & Lef. 398. See Farnham *v.* Burroughs, Dick. 63.

[2] Martin *v.* Martin, 1 Ves. 211, 213.

[3] And, therefore, it may be either for the plaintiff's exclusive benefit, or on behalf of the plaintiff and all the other creditors, though, if it seek relief against the real estate of the testator, it must, of course, be on behalf of all creditors who are entitled to such relief. See Bedford *v.* Leigh, Dick. 707.

relief) for a realization of the security by a sale;[1] and, in analogy to the case of an action at law and a suit in equity by a creditor of a living debtor, he may either pray, first, that the debt be paid by the representative or representatives of the debtor, and, if payment in full shall not be thus obtained, that then the security be realized; or he may pray, first, that the security be realized, and, if that prove insufficient to pay the debt in full, that the remainder be paid by the representative or representatives of the debtor.[2]

It may be inferred from what has been said that, when a debtor dies insolvent, a creditor who has security for his debt may claim dividends from the estate upon his whole debt, just as if he had no security, and may then resort to his security for whatever remains due to him; and such was formerly the law.[3] But, by the Judicature Act, 1875,[4] the rule which has always prevailed in bankruptcy (according to which a secured creditor receives dividends upon so much only of his debt as the security is insufficient to pay) was made applicable to the administration in equity of the estates of deceased persons.

It remains to speak briefly of certain important incidental objects accomplished by equity through the instrumentality of administration suits, — objects which otherwise either would not have been accomplished at all, or would have been accomplished only at a greatly increased expense and delay. These objects are chiefly, first, the promotion of equality among the creditors of deceased debtors; secondly, the application of the real estate of deceased debtors to the payment of all their debts; thirdly, the carrying out of the intentions of testators as to the dispositions of their estates.

First. It has been seen that the common law ranked the creditors of deceased debtors according to the nature of their debts, and that it also empowered executors to make such preferences as they chose among creditors of their testators whose debts were of the same nature. These preferences equity had no power to prevent, but it could and did greatly mitigate the injustice which they would otherwise have worked. The way in which equity did this

[1] Skey *v.* Bennett, 2 Y. & Coll. C. C. 405; King *v.* Smith, 2 Hare, 239. But see White *v.* Hillacre, 3 Y. & Coll. 597; Raikes *v.* Hall, cited 3 Y. & Coll. 605.

[2] See Bedford *v.* Leigh, *supra.*

[3] Mason *v.* Bogg, 2 M. & Cr. 443, overruling Greenwood *v.* Taylor, 1 R. & M. 185.

[4] 38 & 39 Vict., c. 77, s. 10.

was very characteristic (and well illustrates the methods by which equity accomplishes its objects), namely, by counteracting one preference by means of another preference, and thus bringing about an equality. Thus, if a testator, when he died, owed A and B $1,000 each by simple contract, and the executor has paid A $500 while he has paid B nothing, equity will first pay B $500, and then it will pay them both ratably.[1] The principle upon which equity does this is that, when it takes upon itself the administration of an estate, it succeeds to all the powers which the executor previously had, and that it will wield those powers in such manner as will best serve the purposes of justice. It was, however, in counteracting the preferences given by law that equity achieved its greatest success; and this it did upon another principle, namely, that equity is entitled to deal in its own way with rights which are of its own creation. The estates of deceased persons were divided by equity into two great classes of assets, namely, legal and equitable. Legal assets were such as the personal and real representatives of deceased debtors were bound by law to apply in payment of the debts of the latter, while equitable assets were such as they were bound only in equity so to apply. Moreover, this latter class of assets (for reasons which it is not necessary here to enter into) embraced a much larger amount of property than might at first sight be supposed. Whenever, therefore, equity was called upon to administer an estate which consisted in part of equitable assets, it not only applied the latter to the payment of all debts equally, whatever their degree, but, if any creditors to whom the law gave a preference had availed themselves of that preference, the decree directed that such creditors should receive nothing out of the equitable assets until the other creditors were paid the same proportion of their debts out of the equitable assets that they had received out of the legal assets.[2]

Secondly. Equity could not make the real estate of a deceased debtor directly liable for his simple contract debts, without a violation of law; but it exercised the right of throwing the whole burden of the specialty debts of deceased debtors upon their real estate, thus securing the whole of the personal estate for the simple contract creditors; and this it did by means of subrogation. Accordingly, in every administration suit in which the heir or

[1] See *supra*, p. 126, n. 2.

[2] Seton on Decrees (1st ed.), p. 90; Haslewood *v.* Pope, 3 P. Wms. 322.

devisee of the deceased debtor was a defendant, if there were or might be specialty debts, the decree directed that, in case the specialty creditors should exhaust any part of the personal estate in payment of their debts, then the simple contract creditors should stand in their place, and receive payment *pro tanto* out of the real estate.[1] In thus acting, equity was mitigating the effect of an iniquitous rule of law, and was relieving simple contract creditors from a gross injustice; and if the real estate had been by law primarily liable for the specialty debts, the personal estate being, as to such debts, only a surety for the real estate, equity would, as a matter of course, have thrown the specialty debts wholly upon the real estate, in the manner just stated; and even if the personal and real estates had each been primarily liable for the specialty debts, it would have been a matter of course for equity to have thrown upon the real estate its *pro rata* share of such debts. In truth, however, the personal estate was by law primarily liable for all debts, and it was only as a surety for the personal estate that the real estate was liable even for specialty debts; and it seems, therefore, impossible to justify equity, in point of law, in relieving the personal estate from specialty debts by throwing the latter upon the real estate even for so worthy an object as that of securing payment of the simple contract debts.[2]

Thirdly. When a deceased person has left a will, by which he has divided his estate among various persons, or by which he has divided parts of it among various persons, leaving other parts of it undisposed of, it is frequently a very nice question of construction, upon which of the various beneficiaries under the will, and in what order, the burden of the testator's debts and pecuniary legacies shall fall; and this question must of course be decided before the estate can be fully administered. So long as debts and legacies are imposed only upon property which is by law liable for the payment of them, or which is made so liable by the testator, or upon property over which, being equitable assets, the court has full power no technical difficulty can arise, nor any difficulty as to the power of the court. Having decided the question of construction, the court simply proceeds to direct such parts of the estate to be applied in payment of debts and pecuniary lega-

[1] Seton on Decrees (1st ed.), p. 88. See Pott *v.* Gallini, 1 S. & St. 206; Wilson *v.* Fielding, 2 Vern. 763, 10 Mod. 426; Gibbs *v.* Ougier, 12 Ves. 413.

[2] See 1 Harvard Law Review, pp. 69–70.

cies as it has decided ought to be so applied, and in such order as it has decided that they ought to be applied.[1] It often happens, however, that the court goes beyond the limits just indicated. For example, the testator gives specific and pecuniary legacies, and leaves land to descend to his heir, and leaves debts sufficient to exhaust his entire personal estate; but if the specialty debts be all thrown upon the land, the personal estate, not specifically bequeathed, will be sufficient to pay the simple contract debts and the pecuniary legacies. In such a case, the court by its decree will direct that in case the specialty creditors exhaust any part of the personal estate, the simple contract creditors first, and then the pecuniary legatees, shall stand in the place of such specialty creditors, and receive payment *pro tanto* out of the land.[2] The argument, of course, is that the testator must have intended that his legacies should be paid if he left property sufficient to pay them, and that his heir should take only what was left after debts and legacies were paid. The answer is, that legacies are not by law payable out of land any more than debts by simple contract are, unless they are charged upon the land by the testator. It will be admitted that the court cannot make the land liable directly for the payment of legacies, any more than of simple contract debts; and, therefore, it cannot do so indirectly. There seems to be no difference between the case of pecuniary legacies and that of simple contract debts, except in the object which the court seeks to accomplish, the object being, in the one case, to carry out the intention of the testator, in the other, to do justice to simple contract creditors, both undoubtedly worthy objects, but yet not sufficient to justify the court in violating the law.

C. C. Langdell.

[*To be continued.*]

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[1] Haslewood *v.* Pope, 3 P. Wms. 322; Arnold *v.* Chapman, 1 Ves. 108; Davenhill *v.* Fletcher, 1 Madd. Ch. Pr. (3d ed.), p. 768.

[2] Seton on Decrees (1st ed.), pp. 93–4, 96–7; Davenhill *v.* Fletcher, *supra.*